



February 7, 2005

John O. Mirick  
Mirick O'Connell  
100 Front St.  
Worcester, MA 01608-1477

Re: Southbridge Charter & Amendments to the School Budget  
Our File No. 2005-28

Dear Mr. Mirick:

This is in reply to your letter concerning the effect of purported transfers by the town council from the unencumbered balance of the Southbridge school budget. As we understand it, there were transfers to the police department budget and to school transportation. You argue that the provision of Southbridge's charter that allows transfers to be made between departmental appropriations without the approval of the department from whose budget the transfer is made is invalid because it is inconsistent with GL Ch.44 §33B. You also argue that the transfers are in violation of the school committee's fiscal autonomy under GL Ch.71 §34.

In our comments we assume that the transfer from the school budget does not put the town in violation of its funding obligations under education reform (GL Ch.70). Moreover, our comments do not imply any judgment about the wisdom of the transfer from the school budget, or its impact on school operations.

The charter expressly provides (in §2-4-1) that "[e]xcept as otherwise provided in this charter, all general, corporate, legislative, policy-making, and appropriations powers of the town shall be vested in the town council." That seems to us to confirm the view that the charter intentionally excluded departments from any role in approving transfers from their appropriations to other departments' appropriations.

We are skeptical that GL Ch.44 §33B's requirement of departmental approval for transfers from its budget to another department's budget applies to Southbridge. There are two grounds for this skepticism. One is doubt about the scope of §33B; the other is the effect of the charter under the home rule procedures act.

We agree with the Attorney General's analysis and conclusion (see Bob Ritchie's enclosed letter) that *constitutionally* Southbridge is a city, but it is not clear to

us that §33B applies to all municipalities that are cities in the constitutional sense. By its terms, §33B, which requires that the mayor recommend interdepartmental transfers, applies only to cities with a mayor and council form of government, and presumably to cities with city managers, who have the budgetary powers of mayors. See GL Ch.43 §§90 & 104. The statutory scheme for budgets in cities with mayors or city managers (GL Ch.44 §§32, 33, & 33B) vests in those officers nearly absolute power to limit appropriations for any purposes. The requirement of a mayoral recommendation for interdepartmental transfers is one feature of that statutory scheme for the allocation of budgetary powers; the power of departments to veto transfers from their budgets is another aspect.

Southbridge's charter establishes an allocation of budgetary powers quite distinct from that established for cities with a mayor and council form of government. No officer under Southbridge's charter has the budgetary authority of a mayor under GL Ch.44 §§32-33B. The town manager must prepare an annual budget, but the town council can, by a two-thirds vote, appropriate more than the manager recommends in total or for any particular spending purpose (Charter §10-6-1). The town council therefore has much more discretion with respect to the annual budget than a city council has under GL Ch.44 §32 with respect to a mayor's budget line-item recommendations. Although the charter does require that the town manager recommend all appropriation transfers, whether inter- or intra-departmental, it makes no mention of a veto by departments over any such transfers (Charter §10-12-1). The town manager must also certify to the council through the finance director the availability of revenues in excess of those used in the annual budget in order for the council to make supplemental appropriations, something a mayor is not required to do, but the manager need not recommend specific supplemental appropriations, as a mayor must in order for a city council to act. It is not at all obvious that the legislature intended that the budgetary role of departments in cities with mayor or managers must be applicable in cities with such different allocations of budgetary powers as Southbridge has.

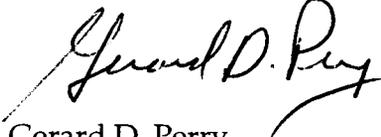
Even if Ch.44 §33B generally applies to cities that do not have a mayor and council form of government, the home rule procedures act, GL Ch.43B §20 provides that charters adopted under it "...shall be deemed consistent with the provisions of any law relating to the structure of city and town government, the creation of local offices, the term of office or mode of selection of local offices, and *the distribution of powers, duties and responsibilities among local offices*" (emphasis added). The suggestion that §33B's rule on inter-departmental budget transfers relates to the financial function of government rather than to its structure or the distribution of responsibilities among offices seems to us to be an unsound dichotomy. We see no reason why a rule relating to a financial function cannot also involve the distribution of powers. Certainly the charter provisions relating to the town manager's budgetary role relate to both the town's financial functions and to the distribution of powers among town offices. Even if departments' power under §33B to veto transfers from

their budgets during the fiscal year were otherwise applicable to cities such as Southbridge, we don't see why it is not a power that the charter can allocate differently from the way the general laws allocates it.

We do not believe that the school committee's fiscal autonomy under GL Ch.71 §34 is implicated by the town council's transfer of funds from the school budget to another department. Since the amendment of Ch.71 §34 by Proposition 2½ (Acts of 1980 Ch.580 §7) a school committee's fiscal autonomy is limited to the allocation of its budget among various school purposes. We do not see how either a transfer from or a reduction in a school budget would violate the school committee's fiscal autonomy, unless the transfer or reduction purported to apply to a particular category of spending within the school budget, such as salaries, or the budget of a particular school or program within the school department. We note that spending for school transportation was not within the scope of the school committee's fiscal autonomy even before §34 was amended by Proposition 2½. See *Ring v. Woburn*, 311 Mass 679.

Given the presumptive validity of a properly adopted home-rule charter, we are unpersuaded that departments in Southbridge have a right to veto transfers from their budgets.

Very truly yours,



Gerard D. Perry  
Deputy Commissioner

Encl.  
GP/CH  
Copy: Bob Ritchie  
Town Counsel

December 8, 2004

Madaline I. Daoust, Town Clerk  
41 Elm Street  
Southbridge, MA 01550

**RE: Southbridge Third Reading - October 4, 2004 — Case # 3134  
Warrant Agenda Item # 8 (General)**

Dear Ms. Daoust:

**Agenda Item # 8** - I return with no action by this Office the amendments to the by-laws voted under this item on the agenda for the Southbridge Town Council meeting, Third Reading, that convened on October 4, 2004, and thereafter submitted to this Office for approval pursuant to G.L. c. 40, § 32. Our reason for taking no action on this item is that Southbridge's charter, as most recently amended and in effect as of July 1, 2004, establishes for Southbridge a city form of government, while the provisions of G.L. c. 40, § 32, are applicable only to towns. Thus, Southbridge is exempt from having to submit by-laws to the Attorney General for approval.

The Town's charter history is most interesting. In 1973, Southbridge adopted a new charter establishing a town council form of government. Deeming Southbridge to be a "city" under the new charter, the Attorney General's review and approval of local laws under G.L. c. 40, § 32, ended. Two years later, by Chapter 790 of the Acts of 1975, a Special Act of the Legislature relating to the Town's 1973 charter, it was declared that by the charter approved by the voters of the Town at its election of March 2, 1973, and "except as otherwise provided" therein, "the town council shall have all the powers and duties conferred on town meetings, and the town manager shall have all the powers and duties conferred on a board of selectmen." Chapter 790, Section 2. Section 3 of the Act stated: "Except where inconsistent with said charter, all provisions of law applicable to towns shall be applicable to the town of Southbridge and said charter shall govern unless said law specifically provides to the contrary."

On January 20, 2003, a duly elected Charter Commission forwarded to the Attorney General a copy of its Preliminary Report for review pursuant to the provisions of General Laws Chapter 43B. We received the Preliminary Report on February 5, 2003. In our letter to the Town of March 3, 2003, we set forth our view that the provisions of the new charter proposed in the Preliminary Report were not inconsistent with the constitution or laws of the Commonwealth. We nevertheless offered guidance on several points, including the observation that it would be unnecessary for the charter to provide -- as was proposed by the charter commission in its Preliminary Report -- that after the new charter takes effect the town council "petition the General Court to repeal Chapter 790." We noted in our review of the Preliminary Report that "the Home Rule Amendment and Home Rule Procedures Act permit the repeal to be effected by the voters on the ballot question proposed in your Final Report." In our letter we also noted that under the new charter Southbridge would be a city and might

wish to refer to its local legislation as “ordinances” rather than as “by-laws,” thus complying with conventional designation. As there is nothing prescriptive in the General Laws on how a municipality shall designate its laws, the Commission in its Final Report held to its earlier preference for the label “by-laws” over “ordinances.”

Following approval by the voters, the new charter went into effect on July 1, 2004, including the operative language of Final Report, Section 13-2-1, which provided that “Chapter 790 of the Acts of 1975 . . . is repealed and shall no longer apply to the Town of Southbridge.” (Emphasis added.) Thus, on July 1, 2004, the effective date of the repeal of Chapter 790, the sole basis upon which “provisions of law applicable to towns” applied to Southbridge ended, leaving Southbridge fully subject to the laws applicable to cities.

Between 1973, when Southbridge voted on its first charter making Southbridge a city with a town council form of government, and 1975, when Chapter 790 went into effect, G.L. c. 40, § 32, was inapplicable to Southbridge, since that section applies only to towns and not to cities.

Between 1975, when Chapter 790 went into effect, and July 1, 2004, the effective date of the new charter, Southbridge -- although a city -- was subject to the provisions of G.L. c. 40, § 32. Chapter 790 did not, in our view, make Southbridge a town; rather, it made statutes otherwise applicable only to towns then applicable to Southbridge. Accordingly, during this 29 year period, all by-laws thereafter adopted by the town council were routinely submitted to the Attorney General for review and approval under G.L. c. 40, § 32.

Upon the recent repeal of Chapter 790, the Town’s form of government had to be reassessed, since the extraordinary statutory basis upon which Southbridge had functioned under the laws applicable to towns had now been removed. This led us to conclude that, for the reasons set forth herein, Southbridge must now be seen as a city, again exempt from the applicability of G.L. c. 40, § 32.

By 1973, Southbridge had joined several other communities that had adopted a “town council” form of government. Previously Agawam and Methuen had done so, and thereafter several others including Franklin, Greenfield, and Barnstable did likewise. As with other “town council” forms of government, the Attorney General ceased his review of local laws adopted by the Southbridge Town Council, Southbridge’s legislative body. Attorney General review of town by-laws resumed in 1975 not because Southbridge became a town, but rather a law applicable only to towns was made applicable to it.

Interestingly, at the very time Chapter 790 was making its way through the legislative process as House Bill No. 5812, the Legislature itself had serious doubt about the bill they were being asked to sign into law at Southbridge’s request. Because of this, the Legislature posed three questions to the Supreme Judicial Court, Questions 1 and 3 being:

1. Would the enactment of House, No. 5812, a petition with local approval, which provides that the town council in Southbridge, a continuing legislative body, shall have all the powers and duties of a town meeting be unconstitutional because of its vague and indefinite application?
3. If the town of Southbridge is a city, is it constitutionally competent for the General Court to provide that all the laws relative to a town shall continue to apply to said municipality, thereby, in effect, creating a form of government which is neither a town or city and for which no provision is made under the Constitution of the commonwealth?

(Emphasis added.)

The Court declined to answer Question 1, explaining its reason:

Asking us to decipher the implications of the bill with respect to the many provisions of the general laws relating to town meetings is like asking “us to examine a long and complicated bill . . . to ascertain whether we can discover questions to be raised as to . . . [its] validity,” and this we cannot do.

Opinion of the Justices to the House of Representatives, 368 Mass. 849, 852 (1975)

The Court answered Question 3 in the affirmative. It found that the General Court was competent to enact the bill. It nevertheless construed the bill as not being an “optional plan” of government as provided by the General Court as envisioned by the second paragraph of Section 8 of the Home Rule Amendment and made available for voluntary adoption by a municipality. Rather, the Court determined that the bill qualified for action by the General Court under the first paragraph of Section 8, that is, as a request for it to “act in relation to cities and towns by special laws enacted on petition” as therein provided.

We think the Legislature, however, left us with a few keys to unlock the mystery of how to classify “a form of government which is neither a city nor a town” when in its requests to the Court it referred to the bill as providing for a town council that is “a continuing legislative body.” This contrasts with a town meeting, whether open or representative, which meets -- and, indeed, may be said to exist -- only at the call of the selectmen. Furthermore, the subjects upon which town meeting exercises legislative power are limited to those prescribed by the selectmen in the warrant, contrasting with the city’s legislative body’s standing authority to set its own agenda.

It has often been suggested that the number of representatives is the determining factor in distinguishing a representative town meeting form of government from a city form of government. This yardstick proves troublesome when we see RTM’s with as few as 50 members, and councils with as many as 27 members. How would the vitality of numbers fare as membership differences lessen? Can you have a council with more members than an RTM?

Under our analysis here, the number of representatives is not controlling in determining whether a form of government is a city or a representative town meeting. Rather, we consider as a more apt determinant whether the legislative body functions in a continuous, on-going basis with control of its own legislative agenda or merely intermittently upon the call of the selectmen who set the meeting’s legislative agenda. For example, a representative legislative body of anywhere between 21 and 55 members might be a city or an RTM depending on the kind of functional analysis we have undertaken in connection with the by-law amendments before us.

By 1978 a question had arisen as to whether a “town council” form of government makes the municipality a “city,” or whether by styling itself a “town” it could thus retain its “town” status. In a letter to the state Department of Public Works dated April 13, 1978, David E. Sullivan, Legal Counsel in the Elections Division of the Secretary of the Commonwealth, wrote the following analysis:

The General Laws and the state Constitution do not define the words “city” and “town.” The Supreme Judicial Court has stated, however: “Traditionally, the distinction between towns and cities was that the former were governed directly by the qualified inhabitants, while the latter were governed indirectly by the inhabitants through representatives.” Del Duca v. Town Administrator, 1975 Mass. Adv. Sh. 1792, 1803 n.6, 329 N.E.2d 748, 753 n.6 (1975) This distinction has been

obscured, however, by the adoption of representative town meeting forms of government, see G.L. ch. 43A, and by the Home Rule Amendment, Mass. Const., Ameend. Art. 2, as amended by Amend. Art. 89.

The courts have stated several times that whether a municipality is a "town" or a "city" is determined not by its nomenclature, but by the substance of its governmental structure. DeI Duca v. Town Administrator, 1975 Mass. Adv. Sh. 1792, 1803 n.6, 329 N.E.2d 748, 753 n.6 (1975); Opinion of the Justices, 1975 Mass. Adv. Sh. 2613, 332 N.E.2d 896, 900 (1975); Opinion of the Justices, 365 Mass. 655, 658, 311 N.E.2d 44, 46 (1974); Woodland Estates, Inc. v. Building Inspector, 1976 Mass. App. Ct. Adv. Sh. 1319, 1326, 358 N.E.2d 468, 472 (1976). But in each of these cases, the court has declined for various reason to decide whether the "town council" municipality should be considered a "city" or a "town."

Thus the question remains essentially undecided by the courts. However, the legislature has enacted a special law with local approval confirming that Southbridge should be considered a town for purposes of state statutes, 1975 Mass. Acts ch. 790, and the 1975 Opinion upheld the constitutionality of this legislation.

Beyond this, all that can be said is that the specific purpose which the distinction is applied may decide whether the municipality should be considered a "city" or a "town" for that purpose. Thus, Southbridge continues to submit its by-laws for approval by the attorney general, as required only for towns by G.L. ch. 40, § 32. Agawam and Methuen do not, and the Appeals Court explicitly refused to decide the propriety of this in its Woodland Estates decision. This office in its publications continues to refer to all these "town council" municipalities as "towns," merely because that is how they refer to themselves.

I have discussed this question with Assistant Attorneys General Margo Botsford and Henry O'Connell, with whom I understand you have also corresponded. I believe they essentially concur in this advice.

In the late 1970's, the Town of Franklin adopted a "town council" form of government. Not long thereafter, the clerk submitted to the Attorney General for approval pursuant to G.L. c. 40, § 32, an amendment inserting a new section in the zoning by-laws of Franklin. Then Attorney General Bellotti, in a letter to the Franklin Town Clerk dated March 3, 1978, wrote back to the clerk advising that Franklin's laws would no longer be subject to Attorney General review and approval. It was his view that Franklin's charter "must be considered a city form of government" and that the Attorney General had "no jurisdiction to review the enactment" adopted by the Franklin Town Council and later submitted to the Attorney General for review pursuant to G.L. c. 40, § 32. In that letter, Attorney General Bellotti laid out the following analysis for his conclusions:

General Laws, Chapter 40, Section 32, requires that town by-laws be approved by the Attorney General. The Franklin Home Rule Charter provides for a town government having a town council of fifteen members and a town administrator. For the reasons set forth below, this must be considered a city form of government. Section 32 does not apply to cities and, as a consequence, the Attorney General has no jurisdiction to review the enactment which you have submitted.

It was decided in Opinion of the Justices, 229 Mass. 601 (1918) (prior to Article LXX of the Amendments) that the General Court could not provide for a limited town meeting regardless of population since the essential characteristic of a town, an open town meeting, was eliminated in favor of a representative government. The court noted, "It is the substance of the thing done, and not the name given to it, which controls." Id. at 610.

Article LXX of the Amendments of the Massachusetts Constitution, adopted in 1926, authorized the General Court to establish a limited town meeting, so called, in towns with over six thousand inhabitants, upon local petition.

The recent Home Rule Amendment (Article LXXXIX of the Amendments, adopted in 1966) continues to recognize a difference between cities and towns. Section 2 provides in part:

No town of fewer than twelve thousand inhabitants shall adopt a city form of government, and no town fewer than six thousand shall adopt a form of government limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

The word "town" implies that a legislative meeting of the inhabitants is to be called by the selectmen.

Your charter does not refer to classic town meetings wherein the legislative powers of the corporate entity are exercised. Without such a town meeting, you would have been classified as a municipal or city government under the original Article II of the Amendments, adopted in 1821. Article LXX and Article LXXXIX do not change this, but rather confirm it by the language quoted above.

The substance of the thing done in your charter is to establish a representative form of city government for a community with more than twelve thousand inhabitants under Article LXXXIX of the Amendments.

Although there may be a question as to what number constitutes a limited town meeting, your charter does not raise this issue, since the town council does not purport to be a town meeting and since the office of selectman is eliminated.

Therefore, in view of the foregoing, you constitutionally have a city form of government. The importance of this is that many general laws apply only to cities or treat cities differently than towns, and these statutes will automatically apply to Franklin.

General Laws, Chapter 40, Section 32, being specifically limited to towns, does not give the Attorney General authority to approve by-laws adopted by a town council form of government since constitutionally it has to be viewed as a city.

I note that another town, Sturbridge [sic., Southbridge], adopted a town council form of government, and thereafter the Attorney General did not review its by-laws. Since the enactment of Chapter 790 of the Acts of 1975, however, the Attorney General has reviewed by-laws of Sturbridge [sic., Southbridge].

The Attorney General has thus made clear that a defining characteristic of a "town" is that the legislative meetings of its inhabitants are called by the selectmen on issuance of a warrant, contrasted with meetings of a continuously existing town council that convenes on a bi-weekly basis and at any other time upon the call of the chairperson or any other three members. Additionally, the scope of legislative authority in a town, whether the town has an open or a representative town meeting, is fixed by the warrant issued by the selectmen. Contrastd with this, the scope and content of the agenda for legislative action by a city is of its legislative body's own design and limits, subject only to the provisions of the local charter and of the constitution and laws of the Commonwealth.

We are mindful that forms of local government in Massachusetts lie across a spectrum of mixed characteristics, and that we are attempting here to discern the point at which they cluster to mark a municipality

as a "city" for purposes of exempting the municipality from the application of G.L. c. 40, § 32. Perhaps no one characteristic alone suffices for making this determination. For example, the Town of Burlington has a charter which declares that its "town meeting shall be a continuous body, but it may adjourn for periods not exceeding 150 days," and that it shall meet at such times and places as the meeting may determine by rule." Burlington Charter, Section 12(a). Nevertheless, the town meeting may still only exercise its legislative powers with respect to subjects on a warrant issued by the selectmen.

Southbridge's charter, on the other hand, vests in the town council "all general, corporate, legislative, policymaking, and appropriations powers of the town," and may exercise those powers on any matter placed on the council's agenda by the council chairperson. Southbridge Charter Sections 2-4-1 and 2-5-2.

We are aware of Town Counsel's letter of September 10, 2004, in which Attorney Lauren Goldberg concludes that by the new charter, and despite the repeal of Chapter 790, Southbridge had not thereby adopted a city form of government but rather continues to have a town form of government with a representative legislative body. Town Counsel cites several parallels between the form of government laid down in the new charter and traditional town forms of government, including use of terms in the new charter that are traditionally and conventionally applicable to towns, such as "by-laws" rather than "ordinances." She also cites several features of the new charter relating to fiscal matters and local elections that are more typical of towns than cities. We cannot conclude, however, that these considerations are determinative, preferring to assess Southbridge, in the absence of Chapter 790, by the same criteria we have applied to other council municipalities.

The salient differences between a city and town for our immediate purposes is whether its legislative body is representative, continuous, and in sole control of its legislative agenda. Applying this standard, we find Southbridge to be a city and no longer subject to Attorney General review of its laws under G.L. c. 40, § 32.

For the foregoing reasons, we must return your submission without action by this Office.

Very truly yours,

THOMAS F. REILLY  
ATTORNEY GENERAL

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enc.

pc:

Town Counsel